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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

RALPH RIVERA,
*Petitioner,*

—v.—

UNITED STATES OF AMERICA,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the pretrial detention of a criminal defendant for more than thirty months violates due process?

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

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RALPH RIVERA,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner Ralph Rivera respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this action on September 1, 1993.

## OPINIONS BELOW

The opinion of the Court of Appeals is reported at 4 F.3d 1038 (2d Cir. 1993) and is reprinted here at Appendix A1. The opinion of the District Court is unreported and is reprinted at Appendix A24.

## JURISDICTION

The judgment of the Court of Appeals was entered on September 1, 1993. On November 29, 1993, Justice Clarence Thomas granted petitioner's application for an extension of time in which to file this petition to January 28, 1994. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment of the United States Constitution provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property without due process of law."

18 U.S.C. 3142(e) of the Bail Reform Act of 1984, provides in pertinent part: "[I]f, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial."

## STATEMENT OF THE CASE

This petition presents the important and recurring question whether pretrial detention of a criminal defendant for more than thirty months pursuant to the Bail Reform Act, 18 U.S.C. § 3141 *et seq.*, violates due process. The Court expressly left this question open in *United States* v. *Salerno*, 481 U.S. 739 (1987), where, in the course of holding that the Bail Reform Act, 18 U.S.C. § 3141 *et seq.*, was not facially unconstitu-

tional, the Court "intimate[d] no view as to the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress' regulatory goal." *Id.* at 746 n.4.

There is now substantial confusion among the Courts of Appeals as to the point at which the length of pretrial detention violates due process. For example, while the Second Circuit below found that due process was not violated by detention of more than thirty months (A1), the Tenth Circuit has found that due process is violated by pretrial detention of more than ten months. *See United States* v. *Theron*, 782 F.2d 1510 (10th Cir. 1986). Similarly, the First Circuit has held that pretrial detention of sixteen months usually would violate due process. *See United States* v. *Zannino*, 798 F.2d 544, 547 (1st Cir. 1986). Moreover, following the Third Circuit's direction in *United States* v. *Accetturo*, 783 F.2d 382, 388 (3d Cir. 1986), several district courts in that circuit have found that due process is violated by pretrial detention for periods of between eight and eighteen months.

## STATEMENT OF FACTS

On August 1, 1991, petitioner was arrested and charged along with several co-defendants with participating in a narcotics conspiracy. On August 6, 1991, petitioner was ordered detained as a risk of flight. (A3). As of the date of the filing of this petition, petitioner had been detained for twenty-nine months, with an anticipated total period of pretrial detention of between thirty-two and thirty-four months.

Petitioner's excessive pretrial detention is the result of a mistrial caused by the prosecution. On March 12, 1993, three

days after the start of petitioner's trial, the prosecution advised the district court that several agents involved in the investigation of petitioner had been arrested for narcotics trafficking. One month later, the court learned that the prosecution had lost between $50,000 and $80,000 in currency that had been seized by one of the suspect agents in the course of arresting a defendant in this case. On April 16, 1993, because the "entire vouchering process in this case is now suspect," *United States* v. *Millan et al.*, 817 F. Supp. 1086, 1089 (S.D.N.Y. 1993), the court granted petitioner's motion for a mistrial. *Id.* at 1090.

Following the mistrial, petitioner moved for release on bail pending retrial, contending that his continued pretrial detention constituted punishment in violation of due process. In granting petitioner's release, the district court found that the "length of detention [had] exceeded tolerable limits," particularly in light of the anticipated total detention of in excess of thirty months (A25-26). The court also found that the prosecution was "primarily, if not solely responsible for the trial's delay since [the mistrial]." (A26). Finally, the court determined that the evidence presented by the prosecution as to his risk of flight "is not sufficient to outweigh the defendant's due process rights" and also noted that petitioner "has lived his entire life in New York City and has solid verifiable ties to the community, including his mother, wife and five children." (A27). The court further found that "the bail conditions proposed by defense counsel will adequately ensure the safety of community members." (A27).

In reversing the release order, the Second Circuit held as a matter of law that pretrial detention in excess of thirty months did not violate due process. While the length of petitioner's detention was "'a factor in [petitioner's] favor' in finding a due

process violation" (A10), the Second Circuit focused on the extent of the prosecution's responsibility for the delay and the strength of the evidence upon which the detention was based. Finding that defense adjournments accounted for the first nineteen months of delay, the Second Circuit held that petitioner bore "primary responsibility . . . for the delay between [his] arrest and retrial." (A14). The Second Circuit also disagreed with the district court's conclusions as to risk of flight and danger to the community, finding instead that the "appearance of . . . Rivera at [his] forthcoming trial and the protection of the community can only be assured by his continued detention." (A22).

The petitioner's trial began on November 15, 1993 and, according to the government's estimates, is likely to last at least through April 1994.

## REASONS FOR GRANTING THE WRIT

### I.

### THIS PETITION PRESENTS AN IMPORTANT QUESTION LEFT OPEN BY THIS COURT IN *SALERNO*.

As this Court has recognized, "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States* v. *Salerno*, 481 U.S. 739, 754 (1987). Even a presumptively innocent defendant who is legitimately found to pose a danger to the community may not be incarcerated indefinitely pending trial. At some point the detention ceases to be regulatory and becomes punitive in violation of due process. *See Bell* v. *Wolfish*, 441 U.S. 520,

538 (1979) (whether pretrial detention has become punitive turns on whether detention "appears excessive in relation to" the nonpunitive purpose); *see also Salerno*, 481 U.S. at 746 (pretrial detention must be "regulatory, not penal").

In *Salerno*, this Court found that the pretrial detention of a defendant who was shown by clear and convincing evidence to pose a danger to the community constituted permissible regulation and was not categorically prohibited by due process. 481 U.S. at 750. Because *Salerno* posed only a facial attack on the Bail Reform Act, 18 U.S.C. § 3141 *et seq.*, the Court declined to address "the point at which detention in a particular case might become excessively prolonged, in relation to Congress' regulatory goal." 481 U.S. at 746 n.4.

There can be no doubt that the pretrial detention of petitioner for more than thirty months is punitive. For example, a person convicted of engaging in a fraudulent scheme in which the loss exceeded $800,000 would have served his sentence before petitioner ever reached trial. *See* U.S.S.G. § 2F1.1 (sentence range for fraud causing a loss in excess of $800,000, but less than $1.5 million, is twenty-four to thirty months). Similarly, Congress has determined that eighteen months is the maximum period of confinement for contempt by a grand jury witness. 28 U.S.C § 1826(a). At that point, the confinement ceases to serve a regulatory purpose (i.e. to coerce compliance with a court order) and instead becomes punitive.

This Court should now decide the question left open in *Salerno* of when pretrial detention becomes excessively prolonged and thus punitive. By any standard, thirty months pretrial detention is too long for detention to be anything but punitive. By setting an outer limit of due process the Court

would provide a standard against which lower courts could measure the facts of individual cases.[1]

## II.

## THE COURTS OF APPEALS ARE DIVIDED OVER WHEN PRETRIAL DETENTION BECOMES SO EXCESSIVE AS TO VIOLATE DUE PROCESS.

This Court should grant certiorari to resolve an important and recurring question of constitutional law upon which the lower courts are squarely divided and hold that pretrial detention for more than thirty months violates due process.

In this case, a panel of the Second Circuit found that pretrial detention in excess of thirty months did not violate due process. A prior Second Circuit panel, however, found that an anticipated twenty-six months pretrial detention violated due process and released a defendant after only fourteen months. *United States* v. *Gonzales-Claudio*, 806 F.2d 334 (2d Cir. 1986).

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[1] This Court could create a presumption that thirty months' pretrial detention violates due process. To overcome this presumption, the government would have to show that it was not responsible for a significant portion of the delay. In this case, the prosecution is solely responsible for the last eleven months of delay, an amount equal to approximately one-third of the total detention period.

In *Gonzales-Claudio*, the Second Circuit recognized that the risk that a defendant might avoid trial was serious, but ordered defendant's release because

> of at least equal gravity is the preventive detention for fourteen months of defendants who are presumed innocent and whose trial to determine guilt or innocence will not even begin until detention has lasted eighteen months. In mandating fundamental fairness, the Due Process Clause endeavors to set outer limits at which risks to society must be accepted to avoid unconscionable deprivations of liberty of individuals.

*Id.* at 342.

Applying the test for a due process violation set forth in *Gonzales-Claudio*, the Second Circuit below conceded that the length of detention in this case favored petitioner, but maintained that "it is not, however, dispositive." (A10). The panel below distinguished *Gonzales-Claudio* on the ground that it "presented . . . significantly greater governmental responsibility for the overall delay than is presented here" (A16), and noted that the Second Circuit had previously "upheld pretrial detention periods of up to thirty-two months." (A11). *See United States* v. *Melendez-Carrion*, 820 F.2d 56, 60-62 (2d Cir. 1987) (authorizing continued confinement of codefendants for anticipated total period of thirty-two months); *but see Ojeda-Rios*, 846 F.2d 167, 169 (2d Cir. 1988) (releasing defendant after thirty-two months on grounds that continued detention for an additional six to eight months violates due process). In fact, in *Gonzales-Claudio*, the total amount of time attributable to government delay was between nine and fourteen months, *Gonzales-Claudio*, 806 F.2d at 341-342, a period

comparable to the eleven-month delay caused by the prosecution in this case.

This Court should grant certiorari because the law is equally unclear in other circuits:

*First Circuit*: The First Circuit has held that "in many, perhaps most, cases, sixteen months pretrial detention would be found to exceed the due process limitations on the duration of pretrial confinement." *United States* v. *Zannino*, 798 F.2d 544, 548 (1st Cir. 1986) (holding that defendant's responsibility for the delay precluded a finding of a due process violation after sixteen months pretrial detention).

*Third Circuit*: Although the Third Circuit has not addressed the precise point at which pretrial detention offends due process, it has established guidelines for district courts in considering this issue. *United States* v. *Accetturo*, 783 F.2d 382, 388 (3d Cir. 1986). Following *Accetturo*, district courts in the Third Circuit have, on four separate occasions, found due process violations in detention periods of as little as eight to as much as eighteen months. *See United States* v. *Lopez*, 827 F. Supp. 1107 (D. N.J. 1993) (releasing defendant held in pretrial detention for eight months pretrial detention with an indeterminate trial date because such a delay is "troublesome" on due process grounds); *United States* v. *Gatto*, 750 F. Supp. 664 (D. N.J. 1990) (finding that fifteen months pretrial detention violated due process notwithstanding the danger the defendants posed to the community); *United States* v. *Vastola*, 652 F. Supp. 1446 (D. N.J. 1987) (three months pretrial detention with an anticipated total detention of eighteen months violates due process); and *United States* v. *Renzulli*, Cr. No. 87-258-7, 1987 WL 17562 (E.D. Pa. 1987) (nine months pretrial detention violates due process).

*Seventh Circuit*: In the Seventh Circuit, twenty-four months pretrial detention has been held not to violate due process so long as, unlike the case here, the prosecution did not significantly delay the proceeding. *See United States* v. *Infelise*, 934 F.2d 103 (7th Cir. 1991).[2]

*Ninth Circuit*: The Ninth Circuit has held that ten months pretrial detention does not violate due process where, again, there is no showing of prosecutorial responsibility for the delay. *See United States* v. *Gelfuso*, 838 F.2d 358 (9th Cir. 1987). Moreover, a district court in that circuit has found that continued pretrial detention after twelve months when a trial date was uncertain violated due process. *See United States* v. *Chen*, 820 F. Supp. 1205 (N.D. Ca.1992).

*Tenth Circuit*: Directly contrary to the Second Circuit, the Tenth Circuit has held that detention beyond ten months violates due process as a matter of law. *See United States* v. *Theron*, 782 F.2d 1510 (10th Cir. 1986) (releasing defendant after four months where anticipated detention would exceed ten months). The Tenth Circuit recently reaffirmed *Theron*, finding that a pretrial detention in excess of thirteen months was "more egregious" than the period in *Theron* and similarly violated due process. *See United States* v. *Denogean*, No. 93-2282, 1993 WL 483018 (10th Cir. 1993).

*Eleventh Circuit*: The Eleventh Circuit has found that eight to ten months in pretrial detention does not violate due

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[2] As the district court and the Second Circuit recognize, the prosecution must bear the responsibility for the delay occasioned by the corruption of the law enforcement agents in this case. (*See* A14, A26).

process. *See United States* v. *Quartermaine*, 913 F.2d 910 (11th Cir. 1990). A district court in the Eleventh Circuit, however, found that pretrial detention for thirteen months violated due process. *See United States* v. *Estrada*, No. 86-511-Cr-Ryskamp, 1987 WL 9454 (S.D. Fla. 1987). Yet another district court in the Eleventh Circuit found that fourteen months pretrial detention did not violate due process but noted that if the trial—then scheduled to commence in four months—were continued "for any reason attributable to the Government, the Court will grant release to [the defendant]. At that point, [the court advised], the line will be crossed." *United States* v. *Martinez*, 678 F. Supp. 267, 269 (S.D. Fla. 1988).

As this survey demonstrates, the lower courts are divided as to when pretrial detention violates due process. The issue of whether more than thirty months pretrial detention violates due process is squarely presented by this case. Moreover, the prosecution bears full responsibility for all of the delay in this case since April 1993 when the district court granted petitioner's motion for a mistrial because of the criminal conduct of government agents. Due process simply does not permit the pretrial detention of a defendant for more than thirty months when the prosecution is responsible for at least eleven months of the delay.

## CONCLUSION

The pretrial detention of petitioner for more than thirty months has become punitive, particularly since the prosecution is responsible for at least eleven months of that delay. Even if the prosecution can show that petitioner poses a threat to society, he still must be presumed innocent and thus may not be punished prior to any conviction. The question of when pretrial

detention has become excessively prolonged as to violate due process, which was left open in *Salerno*, must now be answered. The interests of justice and consistency in the application of the principles of due process require it.

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